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FEDERAL COMMUNICATIONS COMMISSION
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Federal Communications Commission
Office of the Secretary

In the Matter of
The Telephone Company
Protection Act of 1991

CC Docket No.
92-90

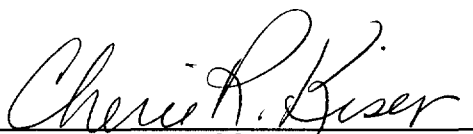
EX PARTE PRESENTATION

Pursuant to 47 C.F.R. § 1.1206, Mr. Fax, through its attorneys, hereby submits notice of its presentation made on September 8, 1992 to Staff of the Office of General Counsel and the Common Carrier Bureau. The presentation reiterated arguments contained in the comments filed on behalf of Mr. Fax in this proceeding. A memorandum was provided as part of the presentation, which outlines portions of the Telephone Consumer Protection Act legislative history relevant to and in support of the position of Mr. Fax. A copy of this memorandum is attached. An original and one copy of this notice have been submitted to the Secretary.

Respectfully submitted,

MR. FAX

By:



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September 8, 1992

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September 8, 1992

FOR: Federal Communications Commission

FROM: LeBoeuf, Lamb, Leiby & MacRae on behalf of Mr. Fax

SUBJECT: The Telephone Consumer Protection Act of 1991
(CC Docket No. 92-90)
Regulatory Clarification regarding Facsimile Transmissions

I. Introduction

The Telephone Consumer Protection Act of 1991 (TCPA) prohibits the use of any telephone facsimile (fax) machine, computer, or other device to send an "unsolicited advertisement" to a fax machine. The TCPA defines "unsolicited advertisement" at 47 U.S.C. § 227 (a)(4), but does not clarify whether a fax transmission to a party with whom the sender has an established business relationship is considered "unsolicited." It is clear, however, that fax transmissions which are not "unsolicited" are not prohibited by the TCPA.

Mr. Fax contends that fax transmissions to clients or customers in the course of an established business relationship are not "unsolicited" because, by virtue of the existing relationship, there is consensual communication between the parties until one or the other indicates otherwise. More narrowly, by virtue of having responded to a fax transmission (thus having established a business relationship), that fax transmission can no longer be considered "unsolicited."

The general intent of Congress was to prohibit "cold contacts" or initial contacts, rather than prohibit legitimate business activity with existing clients or customers: "This language is intended to reflect the view that, if a consumer indicates his or her consent to receive telemarketing calls or solicits or invites such calls, telemarketers would not be restricted in placing such calls to that consumer." S. Rep. No. 177, 102nd Cong., 1st Sess. 5 (1991). Clients or customers in existing business relationships with parties who transmit fax solicitations are not the recipients of "unsolicited advertisements" who the Congress wished to protect. Such fax transmissions are made in the normal course of a business relationship and are neither "cold contacts" nor "unsolicited."

Though fax transmissions made in the course of existing business relationships are not prohibited by the statute because they are not "unsolicited," the statute is ambiguous in that it provides an exemption for telephone solicitations made in the course of existing business relationships, but does not provide a specific parallel exemption for fax transmissions. Mr. Fax, therefore, requests a clarification in the final regulations on this matter. Such clarification would help ensure the balance between commercial speech objectives of advertisers and the privacy concerns of businesses and the public.

II. Legislative History

During debate in both the House and Senate, Members of Congress expressed concern about protecting the public from "nuisance calls," but also acknowledged the need to protect existing business relationships and the right of consenting parties to receive such calls. The President also commented on his concern over unnecessary regulation and curtailing legitimate business activities in his signing statement for the TCPA on December 20, 1991. Following are some excerpts from floor debate on the legislation and a brief analysis of those comments.

Senate

Senator Hollings, the chief sponsor of S. 1462, characterized "unsolicited advertising" over the fax machine as advertisement **without the consent of the person receiving it.** Congressional Record, July 11, 1991, S 9874. (emphasis added)

Senator Pressler noted that the purpose and effect of the legislation was to "... **prohibit cold calls** by any telemarketer to the telephone of a consumer who has no connection or affiliation with that business and who has affirmatively taken action to prevent such calls. Responsible telemarketers will save both time and money by contacting only people who are most

likely to respond positively to such solicitations." Id., November 7, 1991, S 16202. (emphasis added) He repeated this statement in debate on final passage of the conference report. Id., November 26, 1991, S 18317. Senator Pressler added that "the primary purpose of this legislation is to develop the necessary ground rules for cost-effective protection of consumers from unwanted telephone solicitations. **These rules should allow responsible telemarketers to reach consumers who are most responsive to this form of solicitation**, while eliminating the cost and time of contacting those individuals who would be least responsive." Id. (emphasis added)

Senator Gore's remarks highlighted the need for expressly exempting from the prohibitions any calls made based on an existing business relationship because the customers would want to receive information about "... **promotional opportunities from vendors with whom they have had relationships.**" Id., S 16204. (emphasis added)

House

Mr. Rinaldo, a chief negotiator on the bill, specifically acknowledged that "**legitimate businesses use autodialers and fax machines without annoying consumers.**" Id., November 18, 1991, H 10342. (emphasis added) He acknowledged

1304 for businesses with preexisting relationships with customers. Id. In his remarks during debate on the conference report, he reiterated that "...we [recognize] that many legitimate businesses make telephone calls, **including solicitations**, without annoying consumers. Thus, the bill exempts businesses that have a preestablished business relationship with a customer...." Id., November 26, 1991, H 11311. (emphasis added)

Mrs. Roukema characterized the activities she anticipated the law would prohibit as those which "systematically solicit **unsuspecting and unwilling** residential and commercial telephone subscribers." Id., November 18, 1991, H 10342. (emphasis added)

Mr. Mfume mentioned, as well, that "**legitimate solicitations--those allowable under an established business relationship rule--would not be prohibited from reaching those persons that are customers by choice.**" Id., November 21, 1991, E 3940. (emphasis added)

Finally, Mr. Richardson also acknowledged that different rules should apply to calls in which there is an existing business relationship between the caller and the consumer. In his statement during debate on the conference report he explained that "[b]usinesses need to be able to contact

customers with whom they have a prior or existing business relationship. **Generally, these calls are not objectionable to the recipient; they allow the customer to take advantage of special promotions and other offers from vendors with whom they are already familiar."** Id., November 26, 1991, H 11314.

(emphasis added)

Analysis of Remarks

It is apparent that Members of both the House and Senate appreciated the need to allow businesses to maintain viable relationships with existing customers. Most of these comments were made with general reference to the legislation, though some referred specifically to telemarketing. It should be noted that Mr. Rinaldo specifically referred to fax transmissions in this context in his comments on November 18, 1991. The number of references to this particular exemption during floor debate, as well as the express exemption in the statute for telephone solicitations, indicate Congress's sensitivity to the issue. Furthermore, no Member indicated specifically that fax transmissions made during the course of an existing business relationship should not be afforded an exemption similar to that for telephone solicitations.

The comments on "unsolicited advertisements" indicate Members' understanding that recipients of these advertisements

would neither anticipate nor desire receiving them. As stated in Section III below, within the context of an existing business relationship, customers and clients may normally expect additional promotional or sales and services materials from a business, regardless of the means by which it is transmitted. There is no indication in the legislative history that Congress intended to limit the means by which a business may communicate with existing customers, i.e., the distinction between telephone solicitations and fax transmissions was not made to dictate the mode by which companies may contact existing customers.

III. Unsolicited Advertisements

The statutory prohibition on sending "unsolicited advertisement" by fax machine does not include an express exemption for transmissions made in the context of existing or "established business relationships" as does the statutory prohibition on telephone solicitations. The statute is, therefore, vague since the legislative history indicates that Members intended to protect the viability of existing business relationships by exempting certain activities conducted in the normal course of business. Congress, in fact, specifically exempted telephone solicitations to existing clients or customers. (See Section II above.) The omission of an express exemption for fax transmissions in the course of an existing

business relationship should not be interpreted as Congress's intent to not afford fax transmissions a similar exemption. Members' floor statements clearly indicate the contrary.

For the purposes of 47 C.F.R. § 64.1100 (a)(3), the FCC should clarify that fax transmissions sent within the context of an existing business relationship are, by definition, not "unsolicited advertisements." Clients and customers who maintain a business relationship with a company by accepting services and products offered or by other interaction are not the "unsuspecting" or "unwilling" parties the Congress intended to protect. (See Ms. Roukema's comments, Section II.) By virtue of an existing business relationship, a customer or client may expect continued communication from a company, unless he specifically expresses otherwise. As such, the consent to receive communications from the company is inherent in the business relationship. Thus, fax advertisements sent in the course of an existing business relationship, by definition, are not "unsolicited." Since there are no statutory prohibitions on transmissions not "unsolicited," the FCC should clarify this distinction in the regulations.

Finally, Congress's intent on the matter is also evident because of the express exemption under "telephone solicitations." Based on most of the floor remarks during debate, it appears Congress intended for the business

relationship exemption to apply for general purposes, which would include fax transmissions. This interpretation maintains a necessary balance and clearly protects the privacy concerns of individuals who do not have an existing business relationship with a company, and yet ensures the continued viability of beneficial and useful business services.

IV. Authority for Proposed Regulatory Interpretation

Historically, the courts' standard of review for agency action has been deferential and has presumed the validity of agency action. McCown v. Secretary of HHS, 796 F.2d 151 (6th Cir. 1986), and Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). In Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1987), the Supreme Court affirmed that administrative agencies are entrusted with the authority to administer statutes and interpret the statutes with the appropriate standard of review for the purposes of administering it. The Court then outlined a two-step procedure for judicial review of statutory construction by an administrative agency.

First, if congressional intent on the question at issue is unclear, the courts will uphold the agency as long as its interpretation of the statute is "permissible." If, however, the statute is silent or ambiguous with respect to the specific

issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. Id. at 842-45, and Wyckoff Co. v. EPA, 796 F.2d 1197 (9th Cir. 1986). In this instance, if the FCC's interpretation of Congress's intent governing fax transmissions in the course of an existing business relationship is "reasonable," the courts must defer to the FCC's interpretation even if the FCC "could also have reached another reasonable interpretation...." Wyckoff, 796 F.2d at 1200 (quoting Washington v. EPA, 752 F.2d 1465 (9th Cir. 1985)).

V. Conclusion

A reasonable interpretation of the statute, based on the legislative history, could clearly be that Congress's intent to protect existing business relationships extended to the transmission of fax solicitations. Furthermore, the explanations given by Members of Congress for protecting the public from "unsolicited advertisements" clearly indicate that Members intended to protect parties who had no prior business relationship with the transmitting party from "cold contacts" or communications that were not prompted by an existing relationship.

As such, the FCC has clear authority to include clarifying language at 47 C.F.R. § 64.1100 (a)(3). The

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clarifying language should state that "unsolicited advertisement" shall not include an advertisement received by a party which has an existing business relationship with the transmitting party.